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No. 93-17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PIPER AIRCRAFT CORPORATION,

Petitioner,

v.

EDWARD CHARLES CLEVELAND,
by and through the Conservator
of his Estate, Kathleen Cleveland,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AND GENERAL AVIATION MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Aerospace Industries Association of America, Inc. ("AIA") and the General Aviation Manufacturers Association ("GAMA") move this Court, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, for leave to file the accompanying brief *amici curiae*. Petitioner Piper Aircraft Corporation ("Piper")

consents to, and respondent Edward Charles Cleveland does not oppose, the filing of this brief.

I. IMPORTANCE OF THE ISSUES

A principal issue raised by Piper's Petition for Writ of Certiorari is whether Cleveland's state-law product liability claims, alleging that the Piper Super Cub in this case was negligently designed, are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§1301, *et seq.*, and regulations promulgated thereunder by the Federal Aviation Administration ("FAA").

Since 1926, authority for regulating aircraft design has been solely the province of the federal government. Federal statutes and regulations, which impose stringent certification requirements and airworthiness criteria, comprehensively regulate aircraft design and preclude any state regulation in this field. A finding by FAA that an applicant for aircraft certification has complied with these requirements means that the federal government finds that the aircraft is safe for operation. State-law claims alleging negligence in the design of aircraft thus intrude upon federal authority as much as a state statute or regulation purporting to regulate aircraft design. A judge or jury should not be permitted to consider whether an aircraft was negligently designed after federal experts have determined, pursuant to statutory authority, that the aircraft is safe because it complies with FAA's exhaustive design standards and regulatory criteria.

II. INTEREST OF *AMICI*

AIA is the national trade association representing the manufacturers of all types of civilian and military aircraft, spacecraft, missiles, and related systems, components and equipment. GAMA is the national trade asso-

ciation that represents manufacturers of aircraft and aircraft systems, components and equipment used in general aviation. AIA and GAMA are vitally interested in ensuring that the aviation industry is not subject to state judgments that reach aircraft design conclusions not reached by the FAA. The underlying opinion from the U.S. Court of Appeals for the Tenth Circuit permits this substitution of judgment.

WHEREFORE, AIA and GAMA respectfully request that their Motion for Leave to File Brief *Amici Curiae* in Support of Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The Aerospace Industries Association of America, Inc. ("AIA") is the national trade association representing the manufacturers of all types of civilian and military aircraft, spacecraft, missiles, and related systems, components, and equipment. Founded in 1919 as the Aeronautical Chamber of Commerce, AIA has represented the

aircraft manufacturing industry continuously from the earliest days of civil aviation. AIA has approximately fifty members.

The General Aviation Manufacturers Association ("GAMA") is the national trade association representing the manufacturers of aircraft and aircraft systems, components, and equipment used in general aviation. General aviation encompasses aircraft and flying activity that does not involve the scheduled airlines or government aviation. GAMA was founded in 1970 and has approximately fifty members.

AIA's and GAMA's memberships overlap considerably in the field of civil aviation and their respective interests in this case are identical. The aircraft designed and manufactured by AIA and GAMA members are subject to the control of the Federal Aviation Administration ("FAA"). Compliance with detailed FAA design requirements and receipt of FAA approval of each aircraft design must precede the sale of any U.S. aircraft, be it a Piper Super Cub or a wide-bodied jet.

The opinion of the court below affects all U.S. aircraft manufacturers because it permits the various states to second-guess the design of aircraft that the FAA has already approved and to extract a penalty from the manufacturer if the state concludes that a different design is safer. But the consequences of splintering the regulatory authority over aircraft design go beyond damage awards. Diluting FAA's authority by allowing states to decide which designs are qualified for flight and which are not will only retard advances in the technically complex field of aircraft design. *Amici* respectfully submit that Congress never intended state tort law to create a

multitude of aircraft-design experts. The need for uniform standards of air safety is greater than ever.

Because the Tenth Circuit's opinion in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), permits states to substitute their judgment for that of the FAA in derogation of the federal uniformity Congress intended, *amici* urge this Court to grant the Petition for Writ of Certiorari submitted by Piper Aircraft Corporation.

SUMMARY OF ARGUMENT

Existing precedent prevents the states from regulating the design of aircraft *via* legislative enactments, state-agency action, or penalties imposed by their tort systems. The Tenth Circuit disagrees, at least as to state tort systems, because it misreads the savings clause in the Federal Aviation Act of 1958 ("the Act"), 49 U.S.C. app. §§1301-1557 (1988 & Supp. 1991), and finds false support for that misreading in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). The consequence is to frustrate congressional intent in the Act and distort the doctrine of implied preemption.

This Court held over twenty years ago that the states and localities could not regulate aircraft noise, stating, "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624, 633 (1973). The dissent in *City of Burbank* agreed that "Congress clearly intended to pre-empt the States from regulating aircraft in flight" and that the "paramount substantive concerns of Congress were to regulate federally all aspects of air safety. . . ." *Id.* at 644 (Rehnquist, J., dissenting). The Seventh Circuit has held that imposition of non-federal aircraft

design standards to regulate aircraft noise *via* the state's tort system is also preempted. *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989). The First Circuit, in reliance on *City of Burbank* and its own analysis of congressional intent, has held that Congress impliedly preempted state common law in "the field of pilot regulation related to air safety. . . ." *French v. Pan Am Express, Inc.*, 869 F.2d 1, 4 (1st Cir. 1989).

Despite these decisions, the court below held that "Congress did not intend to occupy the field of airplane safety to the exclusion of the state common law." *Cleveland*, 985 F.2d at 1442. This broad holding means that judges and juries in the fifty states can penalize manufacturers for designs that the FAA has determined are safe, thereby deterring manufacturers from using these designs. As the court below recognized, "an award of damages may have the same effect as direct state regulation." *Cleveland*, 985 F.2d at 1441 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

A principal reason for the Tenth Circuit's holding was its overbroad reading of the savings clause contained in the Federal Aviation Act. 49 U.S.C. app. §1506 (1988). Although the savings clause preserves only "remedies" existing at common law or by statute, the court below read it as preserving all "liability," which the court took to mean state common law regarding aircraft design. *Cleveland*, 985 F.2d at 1442-43. This reading overlooked precedent from this Court construing similar savings clauses and contradicts an opinion from the Seventh Circuit construing this very savings clause.

The court held that *Cipollone* bolstered its conclusion "that the savings clause demonstrates the Federal Avia-

tion Act does not preempt state common law." *Cleveland,* 985 F.2d at 1443. On the contrary, *Cipollone* sheds no light whatsoever on this savings clause. Nevertheless, applying the tool of statutory interpretation *expressio unius est exclusio alterius,* the court held that Congress's inclusion in 1978 of express preemption language in the Act regarding airline rates, routes and services, 49 U.S.C. app. §1305(a) (1988), meant that "the Act lacked general preemptive reach." *Cleveland,* 985 F.2d at 1444.

This is a misreading of *Cipollone,* which limits the tool of statutory construction to cases where the express preemption language is a "reliable indicium of congressional intent with respect to state authority." *Cipollone,* 112 S. Ct. at 2618 (quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 505 (1978)). The Court's opinion in *City of Burbank,* without more, establishes Congress's intention that the Act would have broad preemptive reach. *Cipollone* is not authority for the proposition, implicit in the Tenth Circuit's analysis, that Congress intended its 1978 preemption of state authority over airline rates, routes and services to nullify *City of Burbank* and recent decisions of other circuits that have found implied preemption.

ARGUMENT

A. The Court Below Ignored the Paramount Federal Role in Air Safety and Aircraft Design

It has long been clear that the doctrine of implied preemption limits the operation of state law in certain areas of aviation. Yet the court below, faced with the proposition that a limited class of common-law tort claims was preempted by federal law, rejected the notion of implied

preemption entirely. Its opinion cannot be squared with precedent from this Court or the well-reasoned opinions of other circuits.

In *City of Burbank,* the Court examined the Federal Aviation Act and the regulations implementing it and held that federal law preempted state and local control, exercised by way of an ordinance restricting take-off times, over aircraft noise. The Court's opinion quotes the following from the Act:

> Section 1108(a) of the Federal Aviation Act, 49 U.S.C. §1508(a), provides in part, "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . ." By §§307(a), (c) of the Act, 49 U.S.C. §§1348(a), (c), the Administrator of the Federal Aviation Administration (FAA) has been given broad authority to regulate the use of the navigable airspace, "in order to insure the safety of aircraft and the efficient utilization of such airspace . . ." and "for the protection of persons and property on the ground . . . ."

City of Burbank, 411 U.S. at 626-27 (footnote omitted).

The dissent in *City of Burbank* perceived a less extensive federal role in the area of aircraft noise, but acknowledged that implied preemption gave the federal government exclusive control over "the mechanical and structural aspects of jet and turbine aircraft design." *Id.* at 650 (Rehnquist, J., dissenting). While disagreeing that Congress intended to preempt local control of aircraft take-off, the dissent recognized that Congress intended to preempt state regulation of aircraft safety: "The paramount substantive concerns of Congress were to regulate

federally all aspects of air safety. . . . Congress clearly intended to pre-empt the States from regulating aircraft in flight . . . ." *Id.* at 644.[1]

Whereas *City of Burbank* dealt with regulation of aircraft noise through a city ordinance, without discussing state tort actions or the Act's savings clause, the Seventh Circuit addressed both in *Bieneman.* While finding no preemption of the common-law *remedies* sought by the plaintiff, the Seventh Circuit stressed "[t]he essential point . . . that the state may employ damages remedies only to enforce federal requirements. . . ." *Bieneman,* 864 F.2d at 473. Thus, according to *Bieneman,* states may entertain common-law actions for remedies resulting from the violation of federal noise requirements, but establishing noise requirements is exclusively a matter of federal law.[2]

In *French v. Pan Am Express, Inc.,* 869 F.2d 1 (1st Cir. 1989), the First Circuit found implied preemption as to pilot qualifications, which the court characterized as an aspect of air safety. After examining the Act's provisions concerning pilot fitness, the court concluded:

> The intricate web of statutory provisions affords no room for the imposition of state-law criteria vis-a-vis pilot suitability. We therefore conclude, without serious question, that preemption is implied by the comprehensive legal scheme which imposes

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[1] Both the majority and dissenting opinions in *City of Burbank* recognized that implied preemption of state regulation regarding noise might not affect localities acting as proprietors of airports. *City of Burbank,* 411 U.S. at 635-36 n.14, 649.

[2] *Bieneman* recognized the exception for "those aspects of airport operation within the state's control as proprietor under *Burbank.*" 864 F.2d at 472.

> on the Secretary of Transportation the duty of qualifying pilots for air service.

Id. at 4. Although it found that the Federal Aviation Act itself answered the preemption question, the court also examined the regulations concerning pilot fitness and found them fully supportive:

> The regulations promulgated by the Secretary under the Act bulwark our finding that Congress intended to occupy the field of pilot regulation related to air safety, and thus confirm our statutory interpretation. . . . In this case, the regulations, read in conjunction with the Act itself, likewise evince the presence of an imbricated federal scheme for monitoring pilot fitness in the interest of air safety and dovetail neatly with what we believe to be Congress's intent to preempt state law in this area.

Id. Although "this statutory and regulatory mosaic" left the matter clear, *id.* at 5, the court nevertheless turned to the Act's legislative history, with the same result:

> In sum, establishment of a single uniform system of regulation in the area of air safety was one of the primary "object[s] sought to be obtained" by passage of the Act. [*Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988)]. We agree with the Second Circuit that: "The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority – indeed, in one administrator – the power to frame rules for the safe and efficient use of the nation's airspace." *Airline Pilots Ass'n Int'l v. Quesada,* 276 F.2d 892, 894 (2nd Cir. 1960). It is hard to imagine an area of regulation that is more closely related to air safety than pilot qualification. And local restrictions on pilot qualification would make impossible the attainment of the cen-

> tralized control and uniformity of design so plainly coveted by the Congress.

Id. (first alteration in original). Finally, the court cited *City of Burbank,* finding that "the pervasiveness of the federal web is as apparent in the matter of pilot qualification as in the matter of aircraft noise." *Id.* at 6.

Thus, the relevant jurisprudence concerning the scope of implied preemption arising out of the Federal Aviation Act establishes that the states cannot regulate aircraft noise – by ordinance or tort suit, or through restricting flights or prohibiting certain designs – and that they cannot regulate pilot qualifications that affect air safety. Piper's motion for summary judgment on preemption grounds advanced the entirely consistent proposition that the states cannot regulate aircraft design, even indirectly, through their tort systems.

In choosing not to follow *City of Burbank, Bieneman* or *French,* the Tenth Circuit did not explain, from a preemption standpoint, how state aircraft design standards directed at noise differ from state aircraft design standards directed at air safety. Nor did the court explain why a state's role in air safety must yield as to pilot qualifications but survives as to aircraft design. Design considerations affecting air safety are at least as broad as those that affect only aircraft noise, and aircraft design choices affect air safety as much or more than pilot qualifications. By isolating each case and artificially limiting it to its precise facts, without regard for the broader principles or the cases' cumulative import, the Tenth Circuit precluded any coherent reading of congressional intent.[3]

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[3]Thus, the Tenth Circuit emphasized that *French* involved pilot qualifications, but failed to explain why this made a differ-

[footnote continued]

Indeed, although the Tenth Circuit stated that "[p]reemption questions turn on congressional intent," *Cleveland,* 985 F.2d at 1441, the court gave but passing attention to the Act, its legislative history, or the intricate regulatory scheme showing the pervasive federal role in aircraft design. But there can be no doubt that Congress intended, and the FAA has implemented, a paramount federal role in civil aviation. This Court has described at length the "multistep certification process" that Congress established in the Federal Aviation Act and has characterized FAA's implementation of the Act as a "comprehensive set of regulations delineating the minimum safety standards with which the designers and manufacturers of aircraft must comply before marketing their products." *United States v. Varig Airlines,* 467 U.S. 797, 804, 805 (1984).[4] Although stated in a different context, Justice Jackson's description of the federal role in regulating air traffic is equally applicable to aircraft design:

> Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

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ence in the preemption analysis. *Cleveland,* 985 F.2d at 1442 n.7. And while it is true that *French* did not implicate the savings clause, *Bieneman,* which the Tenth Circuit inexplicably never discussed, addressed it at length. *See* discussion *infra* p. 15. The court found *City of Burbank* inapposite because it did not involve allegations of the defective design of an airplane. *Cleveland,* 985 F.2d at 1442 n.7. But this ignores the breadth of the majority opinion and the dissent's agreement that at least design regulation of noise is preempted. *See* discussion *supra* pp. 6-7.

[4]The Court noted the extraordinary degree of interaction between manufacturers and the FAA necessary to complete the certification process. *Varig Airlines,* 467 U.S. at 805 n.7.

The Tenth Circuit attached no significance to these indicia of congressional intent because it concluded that "the plain language of the Federal Aviation Act suggests that Congress intended that the Act have no general preemptive effect." *Cleveland,* 985 at 1441-43. This "plain language" – supposedly overriding all other evidence of congressional intent – consists of the Act's savings clause and the limited express preemption provision covering airlines rates, routes and services. Neither statutory provision dictates the anomalous result the court reached.

B. The Tenth Circuit Misconstrued the Act's Savings Clause

The court below held that the Act's savings clause, without more, required denial of Piper's motion for summary judgment on the grounds of federal preemption. Although the Tenth Circuit's opinion discussed decisions of this Court and others, as well as the 1978 amendments to the Act, the crux of its holding was its reading of the savings clause:

> [T]his section shows that Congress did not intend to occupy the field of airplane safety to the exclusion of the state common law.
>
> * * *
>
> [I]t appears through the savings clause that Congress has intended to allow state common law to stand side by side with the system of federal regulations it has developed.

Cleveland, 985 F.2d at 1442, 1444.

The error of these statements lies in their overbreadth, which reflects a misperception of the limited issue facing the court below. The question is not whether state law has any place in air safety, but whether state law can question the federal government's substantive requirements for aircraft design.[5] The Act's savings clause does not address that issue.

The savings clause addresses only remedies, including common-law remedies:

> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

49 U.S.C. app. §1506. Since the preservation of common-law remedies gives state law a place in aircraft safety, it is obvious that federal law does not completely exclude state common law, but rather permits some aspects of state common law to stand side by side with federal law. But in dismissing this strawman, the Tenth Circuit failed to focus on whether the savings clause permits state law to specify the requirements of aircraft design by penalizing manufacturers who have not adopted a particular state's choice. The savings clause is silent on that score.

Without analysis, the Tenth Circuit equated the saving of state-law "remedies" with the saving of all state-law "liability" and took "liability" to mean any and all state

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[5] As stated by Piper, the question presented is whether federal law preempts "state common-law tort claims that seek to impose liability on aircraft manufacturers *for utilizing aircraft designs* determined by the FAA to be safe and in full compliance with all applicable federal aircraft standards." Piper Aircraft Corporation's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, *Piper Aircraft Corp. v. Cleveland*, (No. 93-17) ("Piper petition") at i (emphasis added).

law. Hence the following juxtaposition: "By its very words, the statute leaves in place *remedies* then existing at common law or by statute. Tort *liability* for design defects was established in the law of many states by the late 1950s and had been extended to airplane crash cases." *Cleveland,* 985 F.2d at 1443 (emphasis added). This leap equates a state remedy with a state definition of design defect for aircraft design. There is no reason to equate these distinct legal concepts.[6]

The court repeated its error when it equated the Act's savings clause with the savings clause contained in the National Traffic and Motor Vehicle Safety Act ("NTMVSA"), which saves "any liability under common law." 15 U.S.C. §1397 (1988). Describing these respective savings clauses as similar, the court reached an irrelevant conclusion: "Like the Act in question here, the NTMVSA contains a savings clause preserving state tort remedies." *Cleveland,* 985 F.2d at 1447. The question was not whether the NTMVSA savings clause preserves state tort remedies, which it presumably does, but whether the Federal Aviation Act's savings clause preserves "any liability under common law," where "liability" includes damages for not employing a state's preferred airplane design. The Tenth Circuit's loose analysis fails to "give effect to the subtle-

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[6] A remedy is a procedural device, "the means by which a right is enforced or the violation of a right is prevented, redressed or compensated." *Black's Law Dictionary* 1163 (5th ed. 1979). A remedy is distinguished from the actual right, "which is a well-founded or acknowledged claim." *Id.* (citing *Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372 (1918)). In contrast, liability "is a broad legal term . . . of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent or likely." *Id.* at 823.

ties of language that Congress chose to employ. . . ." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986).

Legislation that preserves state-law remedies without preserving all normative requirements of state law is not novel. *See, e.g., id.* at 221 (discussing "jurisdictional" savings clauses and "saving to suitors" clauses). This Court's opinion in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), which discussed the Act's savings clause as applied to a claim of primary jurisdiction, is also fully consistent with a limited preservation of state law. In holding that Congress did not preempt the District of Columbia's common law of fraudulent misrepresentation as applied to the practice of airline overbooking, the majority emphasized that Congress had not endeavored to regulate in that area. It is implicit in *Nader* that District of Columbia law could not specify the disclosure requirements for airline overbooking if federal law had already specified those requirements. As stated in Justice White's concurrence, "It may be that under its rulemaking authority the Board would have power to order airline overbooking and to preempt recoveries under state law for undisclosed overbooking or for overselling. But is has not done so, at least as yet." *Id.* at 308 (White, J., concurring). As discussed, the federal government has hardly been silent in the area of aircraft design.[7] *See, e.g., Varig Airlines*, 467 U.S. at 804-05.

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[7] *Nader* considered whether the doctrine of primary jurisdiction permitted the plaintiff's cause of action to proceed in the face of federal law. This case asks the related but narrower question whether a plaintiff can prevail on a cause of action when his success is dependent upon state law interjecting itself where federal law has already regulated. It is not a "remedies" savings clause, but rather the doctrine of implied preemption, that must answer this question.

The opinion of the Seventh Circuit in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989), makes the critical distinction that the Tenth Circuit blurred: "Statutes of this sort save common law remedies even when federal law exclusively determines the content of substantive rules. . . . State courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel." *Id.* at 471. The Seventh Circuit's holding, as relevant to this case, is four-square and precise. Citing the plaintiff's complaints about the aircraft's lack of high-bypass turbofan engines and its inability to climb at a sufficiently steep rate (*i.e.*, complaints about aircraft design), the court stated: "These subjects are governed by federal law, and a state may not use common law procedures to question federal decisions or extract money from those who abide by them." *Id.* at 473.

Bieneman dealt with noise-related design while this case concerns safety-related design. As suggested earlier, however, a state's potential to disrupt federal control of aircraft design on ostensible safety grounds at least equals the threat arising when noise concerns prompt the interference. More fundamentally, the Seventh Circuit correctly reconciled the implied preemption found in *City of Burbank* with the Act's "remedies" savings clause, while the Tenth Circuit's analysis forced it to the extreme view that Congress intended no implied preemption whatsoever in the Federal Aviation Act. *Amici* submit that *Bieneman* is the proper reconciliation of the statutory language and this Court's precedent.

C. The Tenth Circuit Misapplied *Cipollone*

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992), states as follows:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. at 505, "there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.).

Id. at 2618 (parallel citations omitted). The Tenth Circuit relied on this statement to conclude that the Federal Aviation Act's express preemption of state law "relating to rates, routes or services of any air carrier," 49 U.S.C. app. §1305(a) (1988), forecloses any finding of implied preemption. This 1978 amendment to the Act had no such result.

The consequences of this reasoning are enough to refute it. *City of Burbank* unanimously found implied preemption in the area of aircraft noise, with the majority and dissenting opinions disagreeing only about the scope of preemption. Under the Tenth Circuit's ironclad rule, however, *City of Burbank* would have had the opposite result if the city ordinance had been passed in 1979 instead of 1972. Each state would have been free to impose any regulations it wished upon aircraft because "the pervasive nature of the scheme of federal regulation of aircraft noise," *City of Burbank*, 411 U.S. at 633, would have been trumped by the 1978 express preemption clause covering rates, routes and services.

The Tenth Circuit also necessarily reads *Cipollone* as reversing *French* and *Bieneman,* since both decisions found implied preemption notwithstanding the 1978 amendments. If this is correct, then states may regulate pilot qualifications after all, despite the First Circuit's certainty that the Act, the legislative history, and the regulations proved otherwise. And if *Cipollone* reverses *Bieneman,* then private citizens may demand aircraft redesign *via* lawsuits complaining of noise. Such are the consequences if *Cipollone's* principle of statutory construction is meant to have no limits.

Fortunately, the limits are present and clear in the Court's opinion: an express preemption provision negates an inference of implied preemption only where the express language is a "reliable indicium of congressional intent." *Cipollone,* 112 S. Ct. at 1618. Where the Federal Cigarette Labeling and Advertising Act contains an express preemption provision regarding cigarette labeling and advertising, the test is easily met. But this case is vastly different, as Piper has pointed out. Piper Petition at 18. This Court and others have found ample indicia of congressional intent to preempt. These indicia do not disappear by virtue of *Cipollone.*[8]

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[8]The Tenth Circuit was candid in its view that the 1978 amendments and the *Cipollone* opinion rendered *French* "mistaken" and *City of Burbank* "inapplicable." *Cleveland,* 985 F.2d at 1444 n.14. The Eleventh Circuit adopted the Tenth Circuit's reading of *Cipollone* in *Public Health Trust v. Lake Aircraft, Inc.,* 992 F.2d 291, 294-95 (11th Cir. 1993), but never mentioned *City of Burbank, French* or *Bieneman.* Neither the Tenth Circuit nor the Eleventh Circuit has considered the implications for the federal-state relationship in aviation matters if these cases are no longer viable.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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